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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977
No. 77-380

CECIL D. ANDRUS, Secretary of the Interior, *Petitioner*,

vs.

CHARLESTONE STONE PRODUCTS, INC., *Respondent*.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

I. INTEREST OF AMICI

The western states named herein as *amici curiae* all have systems for the administration and determination of water rights. Due in significant part to the security afforded by water rights granted under these systems, the West has been transformed into an economically productive and socially inhabitable region. As the Public Land Law Review Commission stated in its report published in 1970:

> "In nearly 100 years of development, state water law has achieved a reasonable certainty of results which has permitted substantial public and private development in the

> West. While sometimes necessarily complex, the state administrative and judicial procedures have provided a means to determine security of rights to the use of water." Public Land Law Review Commission, *One Third of the Nation's Land* 142 (1970).

Because in vast areas of the West rainfall is slight and water is precious, public policy dictated a rule of law under which water rights could be lost by non-use and acquired only by beneficial use of water. Under the appropriation approach, the first to make a beneficial use of water is protected in that right to the extent of his use. What is a "beneficial use" is determined by the law of the state in which the use occurs. Thus, the appropriation doctrine enables the state to prevent waste and mismanagement of its waters and, unlike the riparian doctrine, vests the state with broad control over its waters.

To help facilitate settlement and development of the West, Congress gave its approval to this water law practice. Thus, in the Mining Act of 1866, Congress confirmed vested rights for mining, agricultural, manufacturing and other purposes that were recognized by the local laws and customs, and approved the appropriative system as a method of obtaining future water rights. 14 Stat. 262 (1866), 43 U.S.C. 661 (1970); *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507 (1874); *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670 (1874).

The Desert Land Act of 1877 encouraged the settlement of irrigable lands by making large tracts available to those who would reclaim them. The Act declared that all non-navigable sources of water on the public domain were held free for appropriation. 19 Stat. 377 (1877), *as amended*, 43 U.S.C. 321 (1970).

Any doubts as to the effect of these acts were laid to rest in *California-Oregon Power Co. v. Beaver Portland Cement Co.*,

295 U.S. 142 (1935) where this Court determined that, by these acts, Congress approved and confirmed the policy of appropriation for a beneficial use, "as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measures of private rights in and to the non-navigable waters on the public domain." *Id.* at 155.

The opinion of the Ninth Circuit Court of Appeals in this case did not consider any of the above statutory provisions or their judicial interpretation. It merely observed that the mining laws did not expressly define water as a non-mineral. The court went on to announce the novel conclusion that water is a mineral for which claims to public lands may be located and perfected under the federal mining laws.

The Ninth Circuit's decision disregards the established precedents of this Court, as well as the administrative decisions of the Department of Interior. Moreover, it runs counter to the applicable statutes, in which Congress expressed its intention that acquisition of water rights on public lands is to be governed by state and local laws, not by the federal mining laws. The western states joined as *amici* in this brief therefore wish to advise the Court of their position in opposition to the Ninth Circuit's decision on this issue.

II. QUESTION PRESENTED

Whether water is a locatable mineral under the federal mining laws.

III. SUMMARY OF ARGUMENT

The decision of the Ninth Circuit Court of Appeals that water is a mineral subject to a location under the federal mining laws, is contrary to the established judicial precedent and administrative decisions interpreting the federal mining laws. It also disregards the clear instructions of Congress that the acquisition of

waters on the public domain is to be governed by state and local laws and not by the federal mining laws.

A decision upholding the validity of Claim No. 22 is not necessary in order for the claimant to utilize the water supply within its boundaries. Federal laws clearly provide for the protection and/or acquisition of a right-of-way by the claimant to utilize this water supply on the adjoining valid sand and gravel claims.

IV. ARGUMENT

A. WATER DOES NOT MEET THE BASIC TESTS OF A LOCATABLE MINERAL UNDER THE FEDERAL MINING LAWS

Congress enacted the General Mining Law of 1872 and its predecessors to encourage development of the nation's resources. *See Consolidated Mut. Oil Co. v. United States*, 245 F. 521, 523 (9th Cir. 1917); *Birchfield v. Thiercof*, 5 Ariz.App. 484, 428 P.2d 148, 154 (1967). To induce development, these laws provided that prospectors could obtain interests in the public domain by locating mining claims on public land. As consideration for the transfer of ownership from the United States to the locater, the law required the locater to discover a valuable mineral deposit. *See Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964).

Discovery of a valuable mineral deposit within the limits of each claim remains a basic prerequisite to a valid mining claim. The test for value requires evidence of a mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that the minerals from the claims could be marketed at a profit. *See Chrisman v. Miller*, 197 U.S. 313, 322–23 (1905); *United States v. Coleman*, 390 U.S. 599, 602–603

(1968). Marketability is usually the critical factor in cases involving non-metallic minerals of widespread occurrence. *United States v. Coleman*, 390 U.S. 599, 603 (1968).

It is clear that the discovery necessary under the mine location statutes is not satisfied merely by the discovery of something categorized as mineral as opposed to animal or vegetable. Otherwise, there would be justification for making mining locations in virtually every part of the earth's surface. *Rummel v. Bailey*, 7 Utah 2d 137, 320 P.2d 653, 655 (1958). As this Court recognized in *Northern Pacific Railroad Co. v. Soderberg*, 188 U.S. 526, 530 (1902), "the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be expected from the grant without being destructive of it."

Consistent with above principles, the administrative decisions by the Department of Interior have repeatedly held that water is not a locatable mineral and that the acquisition of water rights is not governed by the federal mining laws. *E.g., William A. Chessman*, 2 L.D. 774 (1883); *Pagosa Springs*, 1 L.D. 573 (1882). Last year, after reviewing the prior decisions, the Interior Board of Land Appeals, concluded that water could not be classified as a locatable mineral "[i]f we are to pay more than lip service to the doctrine of *stare decisis* . . ." *Robert L. Beery*, 25 IBLA 287, 292 (1976).[1]

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[1] "Similarly, the courts have held that water is not included within a grant or reservation of minerals. *E.g. Mack Oil Company v. Laurence*, 389 P.2d 955, 960–61 (Okla. 1964); *Vogel v. Cobb*, 141 P.2d 276, 280 (Okla. 1943); *Fleming Foundation v. Texaco*, 337 S.W.2d 846, 850 (Tex.Civ.App. 1960). However, it is important to distinguish water which is necessary and useful for agricultural and domestic purposes from waters in gaseous or liquid form which occur as one component of a depletable subsurface mineral resource system,

The Ninth Circuit Court of Appeals did not note these administrative authorities. Instead, the court determined that "[s]ince early times, water has been regarded as mineral, that it has "an intrinsic value in the desert area." Further, although there was "no evidence of a profitable market of the water per se," since the water could be used to wash the sand and gravel from Charlestone's other claims, and there was a profitable market for washed sand and gravel, the court concluded that "Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid."

If the Ninth Circuit's decision is upheld, the way will be opened for claims to title to public lands, based merely on presence of water, or on a showing that such water is used in the

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such as geothermal resources. In its recent decision holding that geothermal resources were included within the mineral reservation contained in patents under the Stock-Raising Homestead Act of 1916, the Ninth Circuit was careful to distinguish between "fresh water for the use of livestock" and "underground sources of energy for use in generating electricity." *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1279, *cert. denied sub. nom. Ottoboni v. United States*, ... U.S. ....., 98 S.Ct. 418 (1977). Citing the "the obvious distinction . . . between underground water suitable for agricultural purposes and geothermal resources," the court held that geothermal resources were within the mineral reservation. In a similar case concerning whether geothermal resources were included within a grant of minerals, the California Court of Appeal held that the water and steam components of geothermal resources were included within the mineral grant, noting that the geothermal waters were cut off from the normal ground water system and that they were unsuitable for surface, agricultural, or domestic use by virtue of the toxic minerals which they contained. *Geothermal Kinetics, Inc. v. Union Oil Co.*, 73 Cal. App.3d 56, 63–64; 141 Cal. Rptr. 879, 882–83 (1977), *petition for hearing filed in California Supreme Court*, No. 1 Civil 40447 (December 23, 1977). See generally Olpin, *The Law of Geothermal Resources*, 14th Annual Rocky Mountain Mineral Law Institute 123, 140–41 (1968)."

development of other valid mining claims. Such a result is clearly contrary to the established judicial prerequisites to a valid mining claim under the general mining law and is in direct conflict with a long line of decisions by the agency charged with administering the public lands. More fundamentally, the decision runs counter to the congressional policy that private acquisitions from the public lands must be accompanied by commensurate public gain resulting from the exploitation of substances traditionally classed as valuable minerals under the mining laws.

B. THE MINING LAW ITSELF AS WELL AS OTHER SETTLEMENT AND DISPOSAL ACTS MAKE CLEAR THAT CONGRESS INTENDED THAT WATER RIGHTS ON THE PUBLIC DOMAIN BE ACQUIRED IN ACCORDANCE WITH THE LAWS OF THE VARIOUS WESTERN STATES

Because in vast areas of the West rainfall is slight, and land is virtually worthless without an adequate supply of water, western water law came to be based on beneficial use of water rather than correlative rights and the appropriation theory rather than the riparian. Note: *Western Water and the Reservation Theory—The Need for a Water Rights Settlement Act*, 26 Mont. L.Rev. 199, 200 (1965).

By a series of acts in 1866, 1870 and 1877, Congress legitimized the appropriation approach practiced in the western states and declared that water on the public lands was open to use, and water rights thereto were to be obtained under the laws of the states and territories. Thus, Section 9 of the Mining Act of 1866 provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights

shall be maintained and protected in the same. Section 9 of the Act of July 26, 1866, 14 Stat. 253, *as amended*, 43 U.S.C. 661.

Section 17 of the Act of July 9, 1870, 16 Stat. 218, *as amended*, 43 U.S.C. 661, also part of the general mining law, provides that all patents to public lands would henceforth be subject to any vested and accrued water rights recognized under the 1866 law.

Congress again evidenced its intention concerning the acquisition of water on public lands by enactment of the Desert Land Act in 1877. The Act provided that the right to the use of water by the claimant of desert lands should depend on prior appropriation, and that "all surplus water over and above such actual appropriation and use together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." Section 1 of the Act of March 3, 1877, *as amended*, 43 U.S.C. 321.

These early acts have subsequently been amended and portions thereof superseded, most recently by the enactment of the "Federal Land Policy and Management Act of 1976." 90 Stat. 2744 *et seq.*, 43 U.S.C. 1701 *et seq.* However, the above stated water rights provisions remain unchanged.

Any doubts as to the effect of these provisions were laid to rest by this Court in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935), wherein the Court stated:

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use,

> as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

With respect to Section 1 of the Desert Land Act of 1877, the Court concluded as follows:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced. *Id.* 295 U.S. at 162.

The Court went on to conclude that "following the Act of 1877, if not before, all non-navigable waters then a part of the public domain become *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain." *Id.* 295 U.S. at 163–164.

From the preceding pronouncements by this Court, one conclusion seems inescapable. Since usufructory rights to non-navigable waters on the public domain are to be disposed of in accordance

with state laws, such waters cannot, at the same time, be disposed of under the general mining laws. Indeed, since two of the three above stated statutory provisions, which were considered by the Court, were enacted as part of the general mining law, it would be incongruous to suggest that Congress intended to dispose of water under other provisions of the mining law.

Congress not only provided in the general mining law that claimants were obliged to comply with state and local laws in securing unappropriated water for use on the public domain, but also sanctioned the acquisition by claimants of rights-of-way for the construction of ditches and canals by which such water uses could be made practicable. Congress provided in Section 9 of the Mining Act of 1866 that "the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." Section 9 of the Act of July 26, 1866, 14 Stat. 253. As with the right to the use of water on public lands, the right to a right-of-way over such lands under this provision was held to be dependent upon the local customs, laws, and decisions of the court. *Jennison v. Kirk*, 98 U.S. 453 (1878) *aff'g* 51 Cal. 288 (1876).

Such rights-of-way were later protected by Congress in Section 17 of the Act of July 9, 1870, which recognized that all patents granted or homesteads allowed would be subject to vested and accrued water rights, "or rights to ditches and reservoirs used in connection with such water rights." It was held that every use of water for purposes of legitimate mining sanctioned by local custom and law was recognized as a right, and protected by this section as such, and within the protection was embraced the means of conveyance by which such uses were made practicable. *E.g. Jacob v. Day*, 111 Cal. 571, 44 P. 243, 245 (1896).

Although the statute speaks only of "ditches and canals," these

terms were construed to be broad enough so that a right-of-way could be acquired for dams, flues, flumes, pipes, and tunnels. *E.g. Peck v. Howard*, 73 Cal.App.2d 308, 167 P.2d 753 (1946). The right to a right-of-way became vested upon completion of the ditch or canal or other work of diversion and appropriation. *E.g. Manix v. Powell County*, 75 Mont. 202, 243 P. 568 (1926).

The Bureau of Land Management in the Department of the Interior, which administers the public domain lands, has historically recognized and adhered to these Congressional instructions concerning acquisition and protection of water rights and rights-of-way on the public domain. The Bureau has never enunciated a separate policy with respect to acquisition or use of waters by permittees, licensees, lessees, or other non-federal users on the public domain. Their apparent position, consistent with the above congressional mandates, has been that any uses of water required by such persons are their responsibility, to acquire under state law. C. Wheatley and C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 238, 285 (1969).

Subsequent to enactment of the general mining laws, Congress passed legislation authorizing the Secretary of Interior, under general regulations to be fixed by him, to grant rights-of-way over public lands "for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs, used to promote irrigation or mining or quarrying or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses. . ." Act of Feb. 15, 1901, C. 372, 31 Stat. 790.[2] However, Congress did

[2]The recently enacted "Federal Land Policy and Management Act of 1976," repealed several laws relating to rights-of-way including the Act of Feb. 15, 1901, C. 372, formerly 43 U.S.C. 959, under which

not repeal the provisions in the mining laws relating to acquisition and protection of water rights and rights-of-way. Moreover, it was held that the later congressional enactment did not by implication repeal the mining law provisions. In a case decided in 1976 by a federal district court in Colorado, it was determined that the mining law provisions gave to the petitioner recognition of the right to appropriate water under state law and the right to the use of public lands for a pipeline, and that the later congressional enactments relating to rights-of-way in general authorized the Secretary of Interior to condition the use of such right-of-way by regulations to protect the public interest. *Hyrup v. Kleppe*, 406 F.Supp. 214 (D.Colo. 1976).

Pursuant to the congressional authorization, the Secretary of Interior, through the Bureau of Land Management, promulgated regulations pertaining to application for a right-of-way over public lands. These regulations presently provide as follows:

> If the project involves the storage, diversion, or conveyance of water, the applicant must file a statement of the proper state official, or other evidence, showing that he has a right to the use of the water. Where the state official requires an applicant to obtain a right-of-way as a prerequisite to the issuance of evidence of a water right, if all else be regular, a right-of-way may be granted conditioned only upon the applicants filing the required evidence of water right from the state official within a specified reasonable time. The conditional right-of-way will terminate at the expiration of the time allowed. 43 CFR § 2802.1–5 (b)

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the Secretary promulgated these regulations. However, the new legislation also authorizes the Secretary to grant rights-of-way in the public domain for construction of water works to divert and appropriate water. Regulations have not yet been promulgated under the new act, and it is presumed that the existing regulations concerning the acquisition of rights-of-way over the public domain for such purposes will continue to apply until such new regulations are promulgated.

In 1976, Congress enacted the "Federal Land Policy and Land Management Act of 1976." This act specifically repealed the language in the mining laws relating to the recognition and protection of rights-of-way over the public domain for ditches and canals, and also repealed several other laws relating to rights-of-way over the public domain. Sections 702–706, Act of October 21, 1976, 90 Stat. 2788–94. However, Title V of the Act, which relates directly to rights-of-way over public lands, contains two provisions of note. First, Section 509 provides that nothing in the Title "shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." Section 509 of the Act of October 21, 1976, 90 Stat. 2781, 43 U.S.C. 1769(a). Furthermore, Section 501(a)(1) of the new Title continues the policy of authorizing the Secretary to grant rights-of-way over public lands for "reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water." *Id.* 43 U.S.C. 1761(a)(1).

The Ninth Circuit Court did not consider the above statutory provisions, their judicial interpretation, or the administering agency's regulations and practices. Instead, to provide the claimant with access to the water supply on Claim 22 the court determined that Claim No. 22 was a valid claim on the basis that water was a locatable mineral under the federal mining laws. This question was apparently neither briefed nor argued before the Ninth Circuit Court. In any event, it is clear that the court's decision on this issue is entirely contrary to the applicable statutes, in which Congress made clear its intention that the acquisition of water rights on public lands is to be governed by state and local laws, not by the federal mining laws.

It is apparently not possible from the record in this case to establish that the claimant, Charlestone Stone, has a permit from

the State of Nevada to use the water in question. It is clear, however, that ground waters are subject to appropriation under Nevada law, Nev. Rev. Stat. §§ 534.020 *et seq.*, and that Nevada law recognizes water for mining purposes as a beneficial use. *See* Nev. Rev. Stat. § 533.340.

It is also apparent that it is not necessary to uphold the validity of Charlestone's Claim 22 in order to permit Charlestone to use the water from the well located within the limits of the claim in its sand and gravel business. The secretary of Charlestone Stone Products testified in the initial contest before the administrative law judge that, prior to 1964, the corporation "excavated a well with ample water on Claim No. 22 at a cost of $13,000 and installed a large storage tank for use in the washing of gravel." *United States v. Charlestone Stone Products, Inc.*, 9 IBLA 94 (1973). If, in fact, the water on Claim No. 22 was used by Charlestone in the washing of sand and gravel on adjoining claims, then under the then applicable provisions of the mining law, Charlestone obtained the right to a right of way upon the completion of the storage tank and other facilities to put the water to use in its business. *Manix v. Powel County*, 75 Mont. 202, 243 P. 568 (1926). Regulations of the Secretary of the Interior would be applicable only to condition the use of the right of way to protect the public interest. *Hyrup v. Kleppe*, 406 F.Supp. 214 (D. Colo. 1976). Even if Charlestone had not put the water on Claim No. 22 to use in its sand and gravel business, present federal law contains provisions whereby Charlestone may obtain a right-of-way so that it may do so. The "Federal Land Policy and Management Act of 1976" provides that applicants may obtain rights-of-way over public lands for "facilities and systems for the impoundment, storage, transportation, or the distribution of water." Section 501(a)(1) of the Act of October 21, 1976, 90 Stat. 2776, 43 U.S.C. 1761(a)(1).

V. CONCLUSION

Public domain lands administered by the Bureau of Land Management are a major portion of total federally-owned lands in the western states. C. Wheatley, C. Corker, *Study of the Development, Management and Use of Water Resources* on the Public Lands 237 (1969). In reliance upon the congressional directives contained in the public land laws, including the federal mining laws, the states have developed comprehensive systems which assure the physical and legal availability of water for proposed uses by water users on these public lands. By now allowing these water users to obtain rights to water under the federal mining laws, the Ninth Circuit decision would revoke the state's jurisdiction with respect to this water and thus unsettle the law of water rights throughout the western states. The states joined as *amici* in this brief therefore urge this court to reverse the Ninth Circuit's decision on this issue.

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